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No. 09-109

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GERALD WILLIAM CARDINAL,

Petitioner,

v.

LINDA METRISH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent acknowledges that the decision in this case conflicts with the Eleventh Circuit's holding in *Smith v. Allen*, 502 F.3d 1255 (2007), that states are not immune to damages claims under RLUIPA. BIO 8. Respondent also does not contest that the issue is of recurring practical importance, given the frequency of RLUIPA litigation. Indeed, as the Brief in Opposition notes, the question has arisen in four courts of appeals in the past eight months alone. *See id.* Nor does respondent dispute the broader significance of the underlying constitutional principles at issue in this case.

Respondent nevertheless resists certiorari on the grounds that the circuit split is unripe for review, that the decision below did not effectively invalidate a provision of a congressional enactment, and that this case presents a poor vehicle for deciding the question presented. BIO 4-5. None of these objections is persuasive.

I. There Is No Reason To Think That The Conflict In The Lower Courts Will Resolve Itself Without This Court's Intervention.

Contrary to respondent's speculations, the Eleventh Circuit has given no indication that it is likely to reconsider its holding in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007). When it decided *Smith*, the Eleventh Circuit was aware of the Fourth Circuit's contrary position, *see Smith*, 502 F.3d at 1270, but found its arguments unpersuasive. To reverse course now would require the circuit to reconsider that holding en banc. But the court denied rehearing en banc in *Smith* itself. *See* 277 Fed. Appx. 979 (11th Cir. 2008). And it subsequently reaffirmed

the Circuit's position in *Hathcock v. Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008).

Respondent notes that in the past few months additional circuits have weighed into the debate, siding with the Fourth Circuit and rejecting the view of the Eleventh. BIO 9. But there is no reason to believe that these decisions will cause the Eleventh Circuit to take up the issue en banc and change its position. The recent decisions have added no significant analyses of their own, but instead have simply pointed to the Fourth Circuit's reasoning in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), and to other courts that have followed it. *See* Pet. App. 11a (adopting the rationale of the Fourth and Fifth Circuits); *Van Wyhe v. Reisch*, No. 08-1409, 2009 WL 2879980, at *9 (8th Cir. Sept. 10, 2009) ("We agree . . . with the analysis of the Fourth, Fifth, Sixth, and Seventh Circuits."); *Nelson v. Miller*, 570 F.3d 868, 884 (7th Cir. 2009) ("We find the Fourth and Fifth Circuits' analysis convincing."). Having already rejected those arguments in *Smith*, there is no reason for the Eleventh Circuit to reconsider its position now.

In fact, despite the recent contrary decisions of other circuits, the Eleventh Circuit last month affirmed an award of damages under RLUIPA to a prisoner in Florida. *See Linehan v. Crosby*, No. 08-15780, 2009 WL 3042038, at *1 (11th Cir. Sept. 24, 2009). As *Linehan* reflects, the availability of damages under RLUIPA is now so well-established in the Eleventh Circuit that the issue no longer warrants published opinions and states appear

unwilling to continue to contest it.[1] And, of course, if states within the Eleventh Circuit view the law as settled, the court of appeals will never have occasion to revisit its decision in *Smith*.

Respondent does not deny that the current division of authority is untenable. As it now stands, different remedies are available to identically situated inmates depending on geography. In *Linehan*, for example, the inmate made the same claim as petitioner here – both sought damages for denial of kosher food in violation of RLUIPA. *Compare* Pet. App. 2a *with Linehan*, 2009 WL 3042038, at *1. Yet because Linehan's case arose in the Eleventh Circuit instead of the Sixth, he received damages, while petitioner did not. If the Eleventh Circuit's view of the law is correct, thousands of inmates nationwide will continue to be denied remedies that Congress intended to provide them based on a mistaken construction of the Eleventh Amendment and this Court's decisions. At the same time, absent intervention by this Court, states within the Eleventh Circuit will continue to be subject to liability that other circuits have held forbidden by the

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[1] It appears that in *Linehan*, the State of Florida did not contest the availability of RLUIPA damages. *See* Supplemental Motion for Summary Judgment for Defendant Crosby at 3, *Linehan v. Crosby*, No. 05-00225-CV-4-MMP-WCS, 2008 WL 6892596 (N.D. Fla. Aug. 20, 2008); Supplemental Motion for Summary Judgment for Defendants McDonough et al. at 2, *Linehan v. Crosby*, No. 05-00225-CV-4-MMP-WCS, 2008 WL 6892596 (N.D. Fla. Aug. 20, 2008); Answer Brief of Appellee Crosby at vi, *Linehan v. Crosby*, No. 08-15780, 2009 WL 3042038 (11th Cir. Sept. 24, 2009); Answer Brief of Appellee McDonough et al. at ii, *Linehan v. Crosby*, No. 08-15780, 2009 WL 3042038 (11th Cir. Sept. 24, 2009).

Constitution. Either way, the continuing conflict is intolerable.

II. Certiorari Is Warranted Because The Court Of Appeals Effectively Invalidated A Provision Of A Federal Statute.

Certiorari would be warranted even absent a circuit split because the decision below effectively invalidated a portion of RLUIPA's remedial scheme on constitutional grounds that only this Court can correct.

Respondent does not deny this Court's special responsibility to ensure that provisions of an Act of Congress are not invalidated by the lower federal courts based on a mistaken view of the Constitution. *See* Pet. 11-12. Instead, she insists that the decision in this case was based solely on "principles of statutory construction," through which "the Court of Appeals held that Congress had chosen not to exercise its authority" to condition receipt of federal funds on a waiver of immunity to suits for money damages. BIO 12. But the court of appeals expressly founded its decision on constitutional grounds, explaining that "the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA." Pet. App. 12a. Moreover, the Sixth Circuit did not dispute that absent Eleventh Amendment considerations, RLUIPA's reference to "appropriate relief" would encompass damages under this Court's decision in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992). *See* Pet. App. 10a. The only reason the court of appeals gave for not giving RLUIPA that construction was because it concluded that doing so would violate the State's rights under the Eleventh Amendment. Pet. App. 10a-12a.

However that decision is characterized, it implicates this Court's important responsibility to ensure that Congress's legislative intent is not thwarted on the basis of an erroneous construction of the Constitution.

III. This Case Presents An Ideal Vehicle To Resolve The Circuit Split.

Although respondent argues that this case presents a poor vehicle for resolving the circuit conflict, she does not deny that the Eleventh Amendment question is squarely presented by the facts of this case, which are typical of many prisoner RLUIPA claims. Nor does respondent contest that the question was preserved by petitioner, was thoroughly considered by the court of appeals, and was dispositive of petitioner's claim for damages below. *See* Pet. App. 5a-12a. Instead, respondent insists that petition presents a poor vehicle for deciding the question presented because, in her view, the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e), independently precludes any meaningful remedy in this case. In particular, respondent argues that because petitioner did not allege a physical injury, Section 1997e(e) of the PLRA permits, at most, an award of nominal damages for the violation of his rights under RLUIPA. BIO 4. Both the premise and the conclusion of this argument are unsound.

The premise is unsound because Section 1997e(e) has no application to this case.[2] For one thing, respondent's assertion that petitioner "never alleged that he suffered a physical injury," BIO 4, is untrue. Petitioner's complaint alleged that for eight days respondent failed to provide him food that he could eat. Complaint ¶ 16. As a result, he alleged, he lost fifteen pounds, suffered "bad abdominal pain," and found his legs "trembl[ing] uncontrollably." Complaint ¶¶ 30-32. Respondent cites no authority for her apparent assumption that such consequences do not satisfy Section 1997e(e)'s "physical injury" requirement. And, in fact, there is authority to the contrary. *See Pratt v. Corr. Corp. of Am.*, 124 Fed. Appx. 465 (8th Cir. 2005) (finding weight loss resulting from lack of religiously acceptable food in violation of RLUIPA was a sufficient physical injury); *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003) (finding as little as four days without food, water, and sleep, might be sufficient and remanding for further fact finding).

In addition, even in the absence of physical injury, a suit alleging a denial of religious freedom in violation of RLUIPA is not an action for "mental or emotional injury" within the meaning of the Section 1997e(e). In *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998), the Ninth Circuit explained that a suit seeking compensation for the denial of religious freedom under the First Amendment is "not . . . a claim for 'mental or emotional injury'" within the

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[2] Respondent did not argue below that petitioner's claims were limited by Section 1997e(e), and neither the district court nor the court of appeals passed on that assertion.

meaning of the PLRA. *Id.* at 1213. As a result, the court held, Section 1997e(e) "does not apply to First Amendment Claims regardless of the form of relief sought." *Id.* In a subsequent case, the Sixth Circuit followed *Canell* in holding that a prisoner's First Amendment retaliation claim was not precluded by Section 1997e(e), even though the inmate alleged no physical injury arising from the retaliation. *See Williams v. Ollis*, Nos. 99-2168, 99-2234, 2000 WL 1434459, at *2 (6th Cir. Sept. 18, 2000); *see also, e.g.*, *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) (stating "[a] deprivation of First Amendment rights standing alone is a cognizable injury").[3] To be sure, petitioner's RLUIPA claim arises under a statue enacted by Congress to vindicate the Constitution's promise of religious freedom, rather than directly under the Constitution itself. But under Section 1997e(e), "it is the nature of the relief sought, and not the underlying substantive violation, that controls." *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005). And as several courts have previously recognized, just because a violation of religious freedom causes an intangible harm does not mean that the injury is properly characterized as "emotional" or "mental," as if the violation of a person's fundamental religious

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[3] Other circuits have held that Section 1997e(e) precludes compensatory, but not nominal or punitive damages. *See Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 327 n.5 (5th Cir. 2009); *Royal v. Kautzky*, 375 F.3d 720, 722-23 (8th Cir. 2004); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Searles v. Van Bebber*, 251 F.3d 869, 879-81 (10th Cir. 2001); *Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000). The D.C. Circuit has held that punitive damages are precluded as well. *See Davis v. District of Columbia*, 158 F.3d 1342, 1348-49 (D.C. Cir. 1998).

beliefs amounted to nothing more than a case of hurt feelings.

Finally, even if nominal damages were the maximum compensation available, this case would still present an appropriate vehicle for resolving the circuit split. Respondent does not claim that the lack of a physical injury would moot petitioner's case or that a case arising in some other context would present the basic statutory and constitutional questions in any materially different light. The only thing denial of certiorari would ensure is the continued untenable disparity in treatment of similarly situated inmates and state institutions in different circuits.

IV. The Sixth Circuit's Decision Was Wrong.

Review is also warranted because the Sixth Circuit's opinion was incorrect.

1. Respondent claims that the phrase "appropriate relief," read in isolation, is insufficiently clear to put states on notice that by accepting federal prison funding, they are subjecting themselves to suit for damages under RLUIPA. BIO 11. But as the petition explains, this Court has made clear that federal funding recipients are required to read statutory funding conditions in legal context, which includes the background legal understanding that when federal law authorizes a cause of action (which RLUIPA unambiguously does) all appropriate relief, including damages, is available to remedy a violation. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66-71 (1992). This is true even under a Spending Clause statute. *Id.* at 74-75 (rejecting argument that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was

enacted pursuant to Congress's Spending Clause power").

Respondent complains that applying *Franklin*'s presumption to RLUIPA conflicts with the requirement that federal funding conditions be clear. BIO 10. But this Court resolved any tension between *Franklin* and the Court's clear notice requirements in *Barnes v. Gorman*, 536 U.S. 181 (2002), when it held that a "funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including "compensatory damages." *Id.* at 187.

Accordingly, at the time the State of Michigan received the relevant federal funds in this case, it was clear that even if RLUIPA did not mention remedies at all, recipients were on notice that accepting the funds would subject them to a damages remedy. By going further and providing an express cause of action for "appropriate relief" – the very phrase this Court used in *Franklin* to describe a Spending Clause remedy encompassing damages – Congress employed what is now a term of art with an established meaning that fully informed the State of the consequences of accepting federal funds. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning" it is presumed to "adopt[] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken").

2. Respondent does not dispute that under *Franklin* and *Barnes*, non-state funding recipients are sufficiently on notice that by accepting federal funds

they subject themselves to damages liability under RLUIPA. *See* BIO 11. She nonetheless asserts that because neither *Franklin* nor *Barnes* "involved a question of state sovereign immunity," what is clear enough for a county-run prison or a municipal jail is not clear enough for a state prison. *Id.*[4] That is incorrect.

Respondent's argument is premised on the undefended presumption that the clarity required by the Eleventh Amendment is greater than that required by the Spending Clause. Petitioner cites no authority for this proposition. And, in fact, it is difficult to imagine a stricter clear statement rule than the one already applied under the Spending Clause to *all* federal funding conditions – the Court has repeatedly held that because "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.' . . . if Congress intends to impose a condition on the grant

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[4] States commonly transfer inmates between state, county, and municipal correctional facilities. *See, e.g.*, N.C. GEN. STAT. § 162-39(b) (2008) ("[W]henever prisoners are arrested in such numbers that county jail facilities are insufficient and inadequate for the safekeeping of such prisoners, the resident judge of the superior court . . . may order the prisoner transferred to a unit of the State Department of Correction designated by the Secretary of Correction."); OHIO REV. CODE ANN. § 341.21(A) (2009) ("The board of county commissioners may direct the sheriff to receive into custody prisoners charged with or convicted of crime by the United States, and to keep those prisoners until discharged."); TENN. CODE ANN. § 41-4-121(a) (2009) ("The sheriff has authority, when the jail of the county is insufficient for the safekeeping of a prisoner, to convey the prisoner to the nearest sufficient jail in the state.").

of federal moneys, it must do so *unambiguously*." *Barnes*, 536 U.S. at 186 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (emphasis added). The Court's sovereign immunity decisions, in turn, likewise require that a government's "waiver of sovereign immunity must extend *unambiguously* to . . . monetary claims." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (emphasis added).

As a result, respondent cannot credibly claim that the Court's conclusion in *Barnes* – that a city is unambiguously on notice that accepting federal funds subjects it to damages under a federal civil rights statute – has no application to state recipients. And, in fact, lower courts have repeatedly applied the damages remedy recognized in *Franklin* and *Barnes* to all federal funding recipients, including state institutions. *See, e.g., Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174 (10th Cir. 2007); *Williams v. Bd. Of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007); *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129, 1133 (9th Cir. 2006); *Lovell v. Chandler*, 303 F.3d 1039, 1056-57 (9th Cir. 2002); *Horner v. Ky. High Sch. Ath. Ass'n*, 206 F.3d 685, 690 (6th Cir. 2000).

As these cases recognize, and *Barnes* and *Franklin* illustrate, Congress can unambiguously condition federal funds on submission to a damages remedy without having to use the word "damages" in the text of the statute. States no less than any other contracting party are expected to read the terms of a funding agreement in light of background legal principles and to understand that terms of art with an established meaning in the law, such as "appropriate relief," must be given their ordinary interpretation. The Eleventh Amendment entitles

states to sufficient notice of the consequences of accepting funds to enable them to make an informed judgment in deciding whether to accept the funding. It does not dictate to Congress the words that it must use to provide states that notice.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition for a writ of certiorari should be granted or held pending disposition of *Sossamon v. Texas*, No. 08-1438.

Respectfully submitted,

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